

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1113 OF 1992

M/s. Vanaz Engineers Ltd, Pune-29. ..Appellant.

Versus.

1. Bank of Maharashtra, Kolhapur.
2. M/s. Tembe Industries Pvt,
Ltd., Kolhapur.
3. Shri. Madhusudan Raghunath Tembe.
4. Mrs. Mrunalini Madhusudan Tembe ..Respondents

Smt. Teja Katdare, for the appellant.

Shri. S. A. Bhagwat, h/f. Smt. Anjali S. Risbud, for
the respondent No. 1.

CORAM: S.B. MHASE &
S. R. SATHE, JJ.

DATE: OCTOBER 9, 2006.

ORAL JUDGMENT : (PER S. B. MHASE, J.)

1. This appeal is directed against the judgment and decree passed by the 2nd Joint Civil Judge, Senior Division, Kolhapur, on 30th June 1990, in Special Civil Suit No. 46 of 1988, inter-alia granting decree in favour of respondent No.1-bank, to the extent that respondent No. 1 shall recover from appellant and

respondent Nos. 2 to 4, amount of Rs. 14,64,683/- being joint and several liability. The appellant and the respondent Nos. 2 to 4 are further directed to bear their costs and to pay costs of the respondent No. 1. Further it was directed that the attachment of property bearing City Survey No. 1136-A situated in 'E' Ward of Kolhapur, made by order dated 5th December, 1988, below Exhibit-5, under Order 38 rule 5 of the Code of Civil Procedure, to continue.

2. Special Civil Suit No. 46 of 1988 was filed by the respondent No.1-bank against the appellant and the respondent Nos. 2 to 4. In the said suit, the appellant was defendant No. 4 while respondent Nos. 2 to 4 were the defendant Nos. 1 to 3. It was a suit for recovery of Rs.14,64,683-24 ps. Said amount was recoverable in view of the loan advanced to the respondent Nos. 2 to 4, while the appellant-original defendant No. 4 was/is a guarantor of the said loan transaction. After filing of the suit, it appears that the respondent No.1-bank had filed application under Order 38 Rule 5 of the Code of Civil Procedure, for attachment before judgment of the house property City Survey No. 1136-A situate in 'E' Ward of Kolhapur and by order dated 5th December 1988 passed below Exhibit-5,

the said property was attached by the Civil Judge, Senior Division, Kolhapur, till the disposal of the suit and after disposal of the suit, said attachment is continued as stated above.

3. It appears that when the application Exhibit-5 for attachment before judgment under Order 38 Rule 5 of the C. P. C was filed, the appellant had filed Say to the application Exhibit-5 and thereafter, matter was contested and the attachment was confirmed, till the disposal of the suit. Said order passed below Exhibit-5 was not challenged by the appellant and/or by the respondent Nos. 2 to 4 and therefore, the said order below Exhibit-5 has obtained finality, as against the appellant and respondent Nos. 2 to 4. After the said proceeding is over, so far as the defendant Nos.1 to 3 is concerned, they have filed pursis at Exhibit-31B dated 03-03-1990 and informed the court that in the W. S, which has been filed by defendant Nos. 1 to 3, the defendant Nos. 1 to 3 have accepted the suit filed by respondent NO.1-bank. However, the plea has been taken that the liability of the loan is on defendant No.4. However, the said defence is given up and defendant Nos. 1 to 3 are not desirous of leading any evidence, either oral or written. Thus, as a result of

the said pursis, the suit claim was accepted by the defendant Nos. 1 to 3 and the complaints or averments made by the defendant Nos. 1 to 3 as against the defendant No. 4 were withdrawn. So far as the defendant No. 4 namely present appellant is concerned, the present appellant has not filed written statement of the main suit and as a result of that suit proceeded as against the appellant, without W. S. Consequence of not filing of the written statement is that under Order 8 Rule 5 of the C. P. C, all the averments made in the Written statement stands admitted and therefore, taking this aspect into consideration namely original defendant Nos. 1 to 3 i.e, respondent Nos. 2 to 4 have specifically admitted the claim in Written statement and pursis Exhibit-31B and that suit claim stands admitted, as a result of not filing of Written statement by the original defendant No. 4 namely appellant, suit stands admitted under Order 8 Rule 5 of the Code of Civil Procedure, and therefore, the trial court has rightly come to the conclusion that the suit claim is admitted by the parties as observed in Paragraph No. 2 of the judgment of the trial court and in the result, suit was decreed.

4. The said decree is challenged by the original

defendant No. 4-appellant. The learned Counsel tried to submit that the property under attachment is first mortgage with the appellant and therefore, claim of the appellant is first claim on the said property and therefore, tried to persuade this court that the decree in respect of attachment is bad. The learned Counsel also tried to submit that the loan for which, appellant is not surety or guarantor, that has been tried to be recovered.

5. So far as the attachment of the property is concerned, during the pendency of the suit, Exhibit-5 was contested by all the parties and therefore, the order was passed below Exhibit-5 and it was not challenged by the parties and thereby said attachment order has become final as against the parties and thereby as against appellant also and therefore, it is not open for the learned Counsel of the appellant to submit that the attachment of the property during the suit and thereafter, is bad, illegal and void. We reject the said submission.

6. So far as adding of the loans for which the appellant was not guarantor, there is no evidence on record and except bare words, there is no material and

that submission is rejected. In the circumstances and facts of the case, we find that the trial court rightly passed decree and there was no cause to challenge the said decree. The appeal is without any substance. It is hereby dismissed with costs.

(S.R.SATHE, J.)

(S.B. MHASE, J.)

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